U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 03Oct2001

CASE NO.: 2000-LHC-2878

OWCP NO.: 08-117647

IN THE MATTER OF:

DAVID A. DOYLE

Claimant

v.

ROWAN COMPANIES, INC.

Employer

and

RELIANCE NATIONAL INDEMNITY CO.

Carrier

APPEARANCES:

QUENTIN PRICE, ESQ.

For the Claimant

DAVID P. AYERS, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et

seq., brought by David Doyle (Claimant) against Rowan Companies, Incorporated (Employer) and Reliance National Indemnity Company (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on July 26, 2000, for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on February 13, 2001, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered eleven exhibits while Employer proffered seventeen exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer on April 20, 2001. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That an injury/accident occurred on December 28, 1999, within the course and scope of Claimant's employment.

2. That an employee-employer relationship existed at the time of the accident/injury.

3. That Employer was notified of the accident/injury on December 28, 1999.

4. That Employer filed Notices of Controversion on March 16, 2000 and April 5, 2000.

5. That an Informal Conference was held on June 15, 2000.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-__ .

6. That medical benefits were "initially" paid by Employer/Carrier pursuant to Section 7 of the Act.

7. That Claimant was paid benefits for eight weeks, from January 21, 2000 to March 16, 2000, at $372.37 per week for a total of $2,978.96 in compensation benefits.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of Claimant's disability.

2. Average weekly wage.

3. Section 7 medical benefits.

4. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he was 34 years old and a high school graduate. (Tr. 28). He has never taken any college or vocational training courses. (Tr. 29). Claimant reported he is married and has two children of ages one and three. (Tr. 30).

In 1993, Claimant began working for the State of Louisiana at the Phelps Correctional Center as a guard on the tactical unit. He explained he had "extensive training on riot situations, hand-to-hand combat. Hostage, riot situations." (Tr. 31). He left his job at the Phelps Correctional Center in 1999 to work for Employer because he needed to earn more money to support his young family. (Tr. 32).

Claimant testified he had broken his arm while working at his dad's restaurant and had broken his arm and leg while playing basketball. (Tr. 33). Besides these injuries, he has never had any significant injuries and has never had a work-related injury. (Tr. 34).

Before working for Employer, Claimant was required to pass a pre-employment physical during a four-hour period in which he was required to "at least lift 115 pounds over [his] head. You had to do like two to three repetitions. You had to take sand bags and you had to pack them around for several minutes. Pick them up, set them up, pick them up, set them down. You had to swing on ropes. You had to take the slips and everything that they use in the oil field, take and put them on, take them off. You had to take a big box full of, I guess it was sand, and you had to push it, and it weighed quite a few pounds. It was four hours of extensive training. I mean you had to go up and down stairs. Crawl. Pull stuff, push stuff. It was pretty much basically what you would be doing on the job." (Tr. 34-35). He reported these activities occurred in Lafayette, Louisiana, during the summer in an un-air conditioned facility. (Tr. 35).

Claimant worked twelve-hour days with Employer. He reported the work was fourteen days on, fourteen days off. Claimant further reported he lived at Employer's facility during the fourteen days he was on-duty. While working at Employer's Sabine Pass facility, his job title was "yardman," but he was paid based on a roustabout's salary. (Tr. 36).

Claimant explained his job with Employer at the Sabine Pass facility entailed policing the yard, picking up trash, hooking up slings and shackles, loading and unloading vessels, loading and unloading trucks, and climbing cranes to grease pulleys. (Tr. 37). He was required to lift 15 pounds over his head daily and climb ladders "at least once or twice a week, if not more." (Tr. 38).

At approximately 6:20 to 6:30 on the morning of December 28, 1999, Claimant reported he was policing the yard and picking up trash. When he picked up a railroad cross tie, which he testified weighs between 75 to 125 pounds, he felt a "pop" in his neck and lower back. (Tr. 40-41, 43). He fell to his knees and dropped the cross tie. He reported being in major pain so he notified his supervisor, Mr. Edward Patnaude, and was sent to the emergency room at Mid-Jefferson Hospital in Nederland, Texas. (Tr. 41, 44; EX-10, p. 1).

While at the emergency room, Claimant underwent an x-ray of his lower back and was told he had pulled muscles in that region. He was given pain medication, muscle relaxants and sent back to work light-duty. (Tr. 41). He explained light-duty work entailed no pushing, no pulling, no bending, no squatting

and no lifting over twenty pounds. (Tr. 42).

On the morning of December 29, 1999, Claimant reported he awoke at 5:00 am and reported for light-duty work despite the pain in his neck and lower back. He was told to wash clothes, cook, clean, wash dishes, mop and sweep in the galley. He confirmed he completed these tasks despite his pain. Claimant stated he performed this form of light-duty work for the remaining few days of his shift. (Tr. 45).

When he returned home for 14 days off, Claimant enjoyed bedrest as activity aggravated his pain. He continued taking his medications, but the pain worsened. When he returned to work on January 17, 2000, Claimant notified the yard superintendent, Mr. Wyrick, about his condition and he was told he would be taken to Houston the following morning. For the remainder of that day, Claimant picked up trash and performed some minor painting. (Tr. 46).

Claimant continued to complain of pain while performing these light-duty tasks. Employer sent him home on January 20, 2000, which is the date he last worked for Employer. Employer referred him to Dr. Esses. (Tr. 47, 94-95). On January 24, 2000, Dr. Esses examined Claimant and ordered an MRI, which was taken on January 26, 2000. (Tr. 48-49). On January 27, 2000, Dr. Esses told Claimant "he couldn't find anything wrong . . . He said that he found there's a few bulged disks . . . but . . . nothing that wouldn't heal over time." Claimant reported Dr. Esses returned Claimant to light-duty with Employer. Specifically, Claimant reported Dr. Esses told him not to "pick up heavy stuff . . . He said just go to work and do what you think you're capable of doing." Claimant stated Employer's policy is "there is no light duty." (Tr. 50). When he returned to Employer's facility and informed Employer that Dr. Esses had placed him on light-duty, he was told there was no light-duty work. (Tr. 51).

On February 7, 2000, Dr. Esses examined Claimant again for complaints of pain in his neck and shoulder. Dr. Esses ordered an EMG. Claimant confirmed he continued to complain of pain in his lower back, but Dr. Esses said "it would get better in time." (Tr. 51). Claimant acknowledged his back had improved at that time, but his neck and shoulder had continued to cause him pain. (Tr. 52).

After undergoing the EMG, Claimant reported that Dr. Esses diagnosed him with carpal tunnel syndrome. (Tr. 52). Claimant then requested a second opinion because he "felt there was something further wrong with me." (Tr. 53). He confirmed he talked to Ms. Erica Townsend, Employer's workers' compensation supervisor about a second opinion before setting up an appointment with Dr. Wilson. (Tr. 53-54). Claimant stated he went to the emergency room on February 24, 2000, for his pain. (Tr. 54; EX-10, pp. 25-27). He reported being given a shot and some pain medication at the emergency room. After the visit to the emergency room, Claimant contacted Mr. Robert Segura, who works for Carrier, to inform Carrier of the emergency room visit. (Tr. 55).

On March 2, 2000, Claimant was examined by Dr. Wilson for problems with his neck, shoulder and arm. (Tr. 56-57). He stated his lower back was feeling better but "still hurt." Claimant stated Dr. Wilson diagnosed him with C6 radiculopathy. (Tr. 57).

On March 16, 2000, Claimant reported he received a phone call from Mr. Segura and was told Carrier was terminating his medical benefits because of a surveillance video. (Tr. 58-59, 91). Claimant stated he attempted to contact Mr. Segura and Ms. Townsend on several occasions and was repeatedly told his benefits were terminated and his job with Employer was terminated. (Tr. 60-61). Claimant noted Dr. Esses ordered a muscle stimulator for his back, and he received a brochure for the stimulator on March 21, 2000. Since Carrier refused to pay medical benefits, Claimant never received the stimulator. (Tr. 63).

Claimant was next examined by Dr. Wilson on March 23, 2000, and Dr. Wilson recommended Claimant see Dr. Foster, a neurosurgeon, for his complaints. (Tr. 59). Carrier refused to authorize treatment by Dr. Foster. (Tr. 60-61). Claimant testified he told Dr. Wilson his neck and shoulder were hurting him, but he thought his lower back "might be getting better." (Tr. 102-03).

On May 30, 2000, Claimant was examined by Dr. Haig for an independent medical examination arranged by the U.S. Department of Labor. After a physical examination, Dr. Haig informed Claimant he needed physical therapy and cortisone shots for his neck and lower back pain. (Tr. 64-65). Claimant testified Dr. Haig informed him that "somebody" would be contacting him within

the next two to three days about therapy, but Claimant reported he was never contacted about therapy after Dr. Haig's examination. (Tr. 65).

After his employment was terminated in March 2000, Claimant searched for jobs through Staffing Specialty Services, an employment agency. He truthfully completed job applications which sought information about past job injuries. (Tr. 76-77). He was not called or hired for any of the jobs to which he applied. (Tr. 75-76).

On July 25, 2000, Claimant began working for Gulf South Systems performing barite recovery. Claimant explained he monitored electrical equipment and fixed electrical problems. He also monitored how much mud was taken up into the mud pit. He further explained barite is a substance which goes into mud to facilitate offshore drilling. (Tr. 71). He stated his work was both offshore and onshore and the work entailed hooking up water lines, water hoses and electrical lines. He confirmed he could perform this work. (Tr. 72, 117). When asked on cross-examination if he was physically capable of performing this work, Claimant stated he performed the work "because I had to, I need to, to support my family, yes, but to take off, I knew I couldn't because I had a family to support." (Tr. 86). He further stated he never had to lift items over his head to perform his work. (Tr. 96).

Claimant testified he got this job through his cousin who worked for Gulf South. (Tr. 76). He worked seven days on and seven days off. If he were working offshore, he made $150.00 per day and if he were working onshore in the shop, he made $112.50 per day. (Tr. 72; EX-8, p. 6). He stated he worked offshore about "four or five times." (Tr. 88). He estimated he spent 50 percent of his time offshore and 50 percent of his time in the shop. (Tr. 96). On November 14, 2000, Gulf South Systems went bankrupt and Claimant lost his job. (Tr. 73-74). Claimant earned a total of $6,937.50 during the approximately four months he worked for Gulf South Systems. (EX-16, p. 6).

Claimant next worked for Oil Tools, Inc., which was hired to finish the job Gulf South Systems was working when it went bankrupt. (Tr. 73). Claimant testified he spoke to Oil Tools, Inc. about a job upon completion of the Gulf South Systems job, but Oil Tools, Inc. would have dropped his pay and required him to drive to Lafayette, Louisiana, which is a 2-hour drive from Claimant's house. (Tr. 74). Payroll records indicate Claimant

worked for Oil Tools, Inc. until December 2, 2000, and earned a total of $1,575.00. (EX-16, p. 4).

On cross-examination, Claimant acknowledged he had checked-off on the job application with Gulf South Systems that he had no disability and any disability which he may have was limited to a pulled muscle in his back from his job injury. He also checked-off he had no injury or disability to his neck, shoulders, arms, hands or fingers. Claimant stated he knew that he had misrepresented his former injuries on the application but he needed a job to support his family. He further stated he informed his supervisor, Mr. Ronnie Gary, of his neck and shoulder injuries. He acknowledged he lied on his application to Gulf South Systems for his financial gain. (Tr. 104-110; EX-8, pp. 17-22).

Claimant went to the emergency room in September 2000 for pain in his neck and lower back. (Tr. 66-67). He reported the only thing he can do to make his neck feel better is to have his wife massage his neck and the only thing he can do to make his lower back feel better is to "pop" it by laying on the floor and rolling over. (Tr. 67-68).

Around January 4 or 5, 2001, Claimant began working for his father-in-law at Shamrock Equipment Rental Company where he drives a pick-up truck and delivers air compressors and air pumps to different locations. He is paid $7.00 per hour. (Tr. 78, 97). Claimant does not carry heavy equipment. He does not climb ladders nor does he lift anything over 15 pounds. (Tr. 79-80). He works as a "hand" and is not a permanent employee. (Tr. 79). He stated he is on-call 24 hours per day and anything he works over 40 hours per week is overtime, for which he is paid time-and-a-half, or $10.50 per hour. (Tr. 80, 98). Claimant estimated he works 65 to 75 hours per week. (Tr. 98). Claimant explained while he was unemployed he was actively seeking employment with temp agencies and the Texas Workforce Commission. (Tr. 75, 77).

Claimant confirmed if he had not been hurt on-the-job, he would still be working for Employer today. (Tr. 35, 116). He stated Employer "apparently" liked his work because he was asked to be a yard superintendent and Employer was going to send him to school. (Tr. 35). He was earning $11.18 per hour with Employer and he further confirmed he enjoyed his work with Employer. (Tr. 40). In response to a discovery interrogatory, Claimant revealed that he earned $29,030.40 in the 52 weeks

prior to December 28, 1999. (EX-7, p. 3).

When Claimant was videotaped on February 1 and February 28, 2000, he emphasized he had "crawled underneath the truck. I hooked up two wires and then I crawled out from underneath the truck." He testified he was under the truck for approximately five to ten minutes. He noted he was also videotaped washing and riding a 4-wheeler with his son on a street beside his house. (Tr. 56, 89-93, 119; EX-18).

Claimant maintained that daily pain prevents him from sleeping every night. He has to switch from his sofa to his bed to the floor every night. (Tr. 68, 101). If he is driving, he has to pull over every forty-five minutes to an hour and then get out of his vehicle and stretch. (Tr. 69). If he is sitting down, he has to stand every fifteen to thirty minutes and stretch. Claimant reported his lower back pain radiates into his leg and his neck pain, which is "steady," radiates into his arm. (Tr. 70). Increased activity, such as work duties, causes more low back pain. (Tr. 101).

Erica Townsend

Ms. Erica Townsend, Employer's liability and workers' compensation supervisor, testified she maintains all Employer's workers' compensation claims and maintains weekly contact with employees with compensation claims. (Tr. 123). She confirmed Mr. Robert Segura has authority to accept or deny responsibility for medical benefits to employees. (Tr. 125-26). She stated her boss, Mr. Bill Hedrick, made the decision to deny medical treatment to Claimant. (Tr. 126). She reported the decision was based on Claimant's misrepresentation of his medical condition to her and Mr. Segura. (Tr. 127).

Ms. Townsend testified that Claimant told her on February 22, 2000, he could not get out of bed, but on February 25, 2000, Claimant was videotaped working under his car. Ms. Townsend acknowledged Claimant had been to the emergency room on February 24, 2000, and had received shots which she "guess[ed]" could have helped him with his pain. (Tr. 128; EX-10, pp. 25-27). She confirmed the decision to terminate Claimant's medical benefits was based on Claimant not appearing to show any signs of stress on the February 25, 2000 video surveillance. (Tr. 131). She testified she believed that Claimant has brought a fraudulent claim. (Tr. 134).

Dena Doyle

Mrs. Dena Doyle, Claimant's spouse, testified she and Claimant have been married for four years. (Tr. 145). She testified she was formally employed by a cardiologist in Houston, Texas. (Tr. 146-47). She confirmed before December 28, 1999, she had not known of any neck, back or shoulder problems with Claimant. (Tr. 146). She accompanied Claimant on his appointment with Dr. Esses and reported Dr. Esses never asked Claimant how he was doing as Claimant had to volunteer that information. She stated Dr. Esses never performed a physical examination on Claimant. (Tr. 147-48). She testified Dr. Wilson performed several tests on Claimant including a physical examination. (Tr. 149).

Mrs. Doyle reported the emergency room visit on February 25, 2000, during which Claimant received a shot of Demerol[2] and Phenergan[3] and a Vicodin prescription, eased Claimant's pain "tremendously" and he was able to get a decent night's rest for the first time in "weeks." (Tr. 154, 164-65; EX-10, pp. 25-27).

Mrs. Doyle testified a brochure for a muscle stimulator for Claimant's back arrived on March 21, 2000 with a business card attached. She testified Claimant called the number attached to the business card and was told that Dr. Esses had ordered the stimulator for him. She further reported Claimant talked to "Anita" in Dr. Esses's office about the muscle stimulator for Claimant's back. (Tr. 155).

Mrs. Doyle stated she believes Claimant's condition has worsened since February 2000 because Claimant comes home from work in pain and is not taking any pain medications or muscle

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[2] Demerol is a trademark name for meperidine hydrochloride which is a synthetic narcotic analgesic used as a pre-anesthetic medication when a relatively short duration of analgesia is desired. Dorland's Illustrated Medical Dictionary 1014 (28th ed. 1994).

[3] Phenergan is the trademark name for promethazine hydrochloride which is used to provide bedtime sedation, to potentiate the action of central depressants and to manage nausea and vomiting associated with surgery and motion sickness. Id. at 1362.

relaxants. (Tr. 163).

The Videotape Surveillance

Employer/Carrier submitted videotape surveillance of Claimant dated January 26, 2000 through January 30, 2000 and February 1, 2000. (EX-17). Claimant acknowledged he was filmed in this video. (Tr. 89-93). The videotape swiftly progresses from January 26, 2000 through January 30, 2000. The videotape primarily focuses on the events of February 1, 2000, in which Claimant is seen with a waterhose washing a 4-wheeler, which is located in the back of a pick-up truck, washing the pick-up truck and riding the 4-wheeler on a smooth surface for a short period of time with his son. All other scenes in this videotape do not contradict testimony given by Claimant. (EX-17).

A second videotape filmed on February 25, 2000, was proffered by Employer/Carrier, which revealed three individuals working on a pick-up truck at various moments over a one-hour period. (EX-18). The video picture is not clear and it is not possible to determine the faces or identities of the individuals filmed therein. Claimant acknowledged he had seen this video and was filmed on this day, but that he had only climbed underneath the truck to hook-up two wires which took five to ten minutes. (Tr. 56, 89-93, 119). All other scenes in this videotape do not contradict testimony given by Claimant. (EX-18).

The Medical Evidence

Mid-Jefferson Hospital

Claimant was admitted to the emergency room at Mid-Jefferson Hospital in Nederland, Texas, on December 28, 1999, at 7:25 a.m. for pain in his lower back. (EX-10, p. 1; CX-6, p. 9). X-ray reports indicate “moderate intervertebral disc space narrowing and mild end plate degenerative changes at the L5-S1 level” but no fractures or dislocations. (EX-10, p. 7; CX-6, p. 15). He was discharged to return to work on December 29, 1999, for modified duty with lifting restrictions of 20 pounds and no bending, pushing or pulling for the next five days. (EX-10, pp. 8-9; CX-6, p. 1). He was prescribed Celebrex and Flexeril. (EX-10, p. 9; CX-6, p. 3).

Stephen L. Esses, M.D.

Dr. Stephen Esses, a board-certified orthopaedic surgeon with a practice limited to disorders of the spinal column and the director of the residency training program in orthopaedic surgery at Baylor College of Medicine in Houston, Texas, testified by deposition on February 13, 2001. (EX-15).

He initially examined Claimant on January 24, 2000, upon a referral from Employer, for complaints of low back pain which radiated into his right buttocks and complaints of neck pain which radiated into his right shoulder, both of which are associated with a work injury on December 28, 1999. (EX-10, p. 12; CX-8, p. 12; EX-15, pp. 11-13). Dr. Esses testified he "personally" conducted an examination of Claimant. Examination of Claimant's neck revealed limitation in range of motion due to pain and guarding with full motor strength in all muscle groups of the upper extremities. Examination of Claimant's lower back revealed tenderness to superficial palpation on the right paravertebral area about L5. Dr. Esses discerned no spasm although Claimant's range of motion was limited by pain and he had negative straight leg raising signs. Dr. Esses disputed Claimant and his wife's testimony that he did not conduct a physical examination by "touching Claimant." (EX-15, p. 14). He stated he had to push on muscles to determine and note tenderness and test reflexes. (EX-15, p. 15). Claimant had no signs of nerve involvement which is supported by his denial of any radicular complaints in the upper or lower extremities, lack of motor weakness and symmetrical reflexes. (EX-15, pp. 16-17). Dr. Esses recommended an MRI of both the cervical and lumbar spine because of Claimant's continued complaints. (EX-10, p. 13; CX-8, p. 13; EX-15, pp. 14-17).

An MRI of Claimant's cervical and lumbar spine was performed on January 26, 2000 at Memorial Hermann Baptist Hospital in Beaumont, Texas. The MRI of Claimant's cervical spine revealed there was a small subligamentous central bulging disc at the C5-6 level and small focal herniation at the C6-7 level, but no evidence of any nerve root compression. (EX-10, p. 14; CX-8, p. 9; EX-15, pp. 17-18). The MRI of Claimant's lumbar spine revealed there was focal herniation at the L5-S1 level, associated changes of discogenic disease at the L5-S1 level as well as facet arthritis and early changes of discogenic disease at the L4-L5 intervertebral disc level characterized by mild

signal loss, but no distinct nerve root compression. (EX-10, p. 16; CX-8, p. 11; EX-15, p. 18). Dr. Esses opined the MRI revealed no structural damage and no evidence of any acute injury in the cervical or lumbar spines. (EX-15, pp. 18-19).

Claimant was seen in follow-up on January 27, 2000, after Dr. Esses had reviewed the results of the January 26, 2000 MRI. Dr. Esses agreed with the findings from the MRI and discussed with Claimant the reason for his pain is muscular sprains in his lumbar and cervical muscles, which would improve. Dr. Esses expected this problem would resolve in a "short while" and released Claimant to return to his usual job activities at his own discretion and he could determine his restrictions accordingly. (EX-10, pp. 18-19; CX-8, pp. 6-7; EX-15, pp. 17, 19-20, 32, 50). He placed no restrictions on Claimant as Claimant stated he could return to work. (EX-15, pp. 20-21).

Dr. Esses examined Claimant on February 7, 2000, for exacerbation of pain in his neck and right shoulder. Claimant reported that from his last visit "something had happened." Claimant stated the pain prevented him from returning to work and significantly limited his activities. Dr. Esses again performed a physical examination of Claimant's neck, upper extremities, low back and lower extremities. Claimant exhibited more limitation of cervical range of motion and neurologic weakness in his right upper extremity due to pain. In contrast, his sensory exam was normal. Dr. Esses affirmed pain is a subjective complaint which cannot be measured or tested. There were no objective findings to document Claimant's symptoms. Claimant continued to complain of lower back pain, however, this pain seemed to be somewhat improved from his last visit. Dr. Esses recommended an electromyography (EMG) of Claimant's upper extremities. (EX-10, p. 21; CX-8, p. 4; EX-15, pp. 22-25).

On February 15, 2000, an EMG was performed on Claimant's upper extremities. The EMG revealed Claimant had abnormal nerve conduction studies compatible with right carpal syndrome. (EX-10, pp. 22-23; CX-3, pp. 1-2). Dr. Esses examined Claimant on February 21, 2000, and agreed with the EMG diagnosis of right carpal tunnel syndrome. Dr. Esses informed Claimant the EMG showed no evidence of cervical radiculopathy. He then recommended Claimant see a hand surgeon. (EX-10, p. 24; CX-8, p. 3; EX-15, pp. 25-28). Dr. Esses reported carpal tunnel syndrome is generally associated with repetitive use rather than from an acute injury. (EX-15, p. 28). On cross-examination, he stated carpal tunnel syndrome can be caused by a traumatic event

but generally it is caused by repetitive motion. (EX-15, p. 55). Dr. Esses did not associate Claimant's carpal tunnel syndrome symptoms to his work with Employer because Claimant did not report any symptoms of carpal tunnel syndrome at the time of the accident or immediately thereafter. (EX-15, pp. 29, 56).

On March 27, 2000, Dr. Esses observed the videotape surveillance of February 25, 2000, and opined that if "the video tape is accurate and does indeed depict my patient David Doyle then it is my opinion that Mr. Doyle is certainly capable of returning to gainful employment at the present time. It is further my opinion that the restrictions and symptoms that Mr. Doyle had told me about recently are not in keeping with what I have seen on this video tape." (EX-10, p. 35; CX-8, p. 2). Dr. Esses testified that on February 7, 2000, Claimant had reported "he was pretty much incapable of doing anything." Dr. Esses stated it was hard to reconcile that with the video activity of washing a car and getting underneath a vehicle. (EX-15, p. 32). Dr. Esses testified he would associate the activities Claimant was performing in the surveillance video to activities that might be required when an individual is working. Therefore, he opined Claimant could "certainly" return to "gainful employment." (EX-15, p. 31). On June 30, 2000, Dr. Esses clarified that Claimant could return to his former employment working in the yard. (EX-15, p. 39).

On June 30, 2000, Dr. Esses opined, based on the videotape surveillance of February 25, 2000, that Claimant had reached maximum medical improvement (MMI) as of February 25, 2000. (EX-10, p. 39; CX-8, p. 1). He emphasized he would place no restrictions on Claimant after March 27, 2000, as Claimant had no structural problems. (EX-15, p. 33). Moreover, he does not consider Claimant a surgical candidate for problems with either the cervical or lumbar spine. (EX-15, p. 34).

On cross-examination, Dr. Esses emphasized Claimant's arm and shoulder complaints are due to a muscle sprain and not a neurological nerve root impingement because "in very rare instances" possibly a C2 or C3 nerve root injury could give rise to shoulder pain. (EX-15, pp. 45-46). He stated a C6 nerve root impingement causes "pain going from the neck down the arm past the level of the elbow to the hand usually involving lateral digits." He explained the digits involved with Claimant are the middle and index fingers along with the thumb. (EX-15, p. 46). He ordered an EMG on February 7, 2000, because Claimant reported for the first time that he now had pain in the upper

right extremity which he had previously denied. He noted Claimant's reported symptoms had changed and there is the rare possibility that "you could have a cervical radiculopathy despite a normal MR scan." (EX-15, p. 49). Claimant never made complaints consistent with C6 radiculopathy into his fingers and thumb. (EX-15, p. 65). He testified if Claimant is currently experiencing symptoms consistent with C6 radiculopathy it does not mean his condition is related to the December 28, 1999 incident. (EX-15, p. 65).

Dr. Esses confirmed he never prescribed a muscle stimulator to Claimant and has no explanation for why Claimant received a muscle stimulator brochure on March 21, 2000, from his office. (EX-15, pp. 62, 65). He stated if he had thought either therapy or steroid injections would have helped Claimant, he would have prescribed them. (EX-15, p. 64).

Memorial Hermann Baptist Emergency Department

On February 24, 2000, at 6:02 p.m., Claimant was admitted to the emergency room at Memorial Hermann Baptist Hospital for right shoulder and neck pain. (EX-10, pp. 25-26; CX-7, pp. 1-2). Dr. Aug Ba conducted an examination with clinical assessment findings that detected tenderness of the C5 and C6 levels at the right side, positive pain and tenderness on lateral rotation of the neck and reduced pin prick sensation at the median nerve distribution area from forearm to hand. (CX-7, p. 8). Dr. Ba rendered a clinical impression of neck sprain and rule out cervical radiculopathy. (EX-10, pp. 29-30; CX-7, p. 6). Claimant was administered injections of Demerol and Phenergan and prescribed Vicodin for severe neck pain. (EX-10, p. 27; CX-7, pp. 3, 6).

On September 15, 2000, Claimant was again admitted to the emergency room at Memorial Hermann Baptist Hospital and examined by Dr. Foster. Only receipts of this visit are in evidence. (CX-9, p. 2). Receipts of Claimant's prescriptions after this emergency room visit indicate he was given Naproxen and Carisoprodol for severe muscle spasm. (CX-9, p. 4).

Frederic B. Wilson, M.D.

Dr. Frederic Wilson, an orthopaedic surgeon, testified by deposition on December 11, 2000. (EX-14; CX-2). Dr. Wilson is board-eligible in orthopaedic surgery, but has failed the

certification test twice. (EX-14, pp. 5, 19; CX-2, pp. 5, 19). He initially examined Claimant on March 2, 2000, over two months after the accident, for complaints of neck, right shoulder and arm pain. Claimant did not complain of low back pain. (EX-14, p. 26). Claimant reported his mother had recommended Dr. Wilson. (EX-14, p. 7; CX-2, p. 7). During the examination, Claimant indicated his back pain had resolved. (EX-14, p. 28). Upon physical examination of Claimant, which included pinwheel testing and grip strength testing, Claimant's shoulders and upper extremities showed no visible atrophy or deformity, with full shoulder motion. Claimant complained of "continuous numbness and tingling" mainly to his right upper extremity. (EX-14, pp. 7-8). Pinwheel testing showed decreased sensation of the right forearm down to the thumb, index and middle fingers. Grip strength testing revealed decreased strength of the right dominant hand. (EX-14, p. 8). Dr. Wilson reviewed the EMG and nerve conduction studies which revealed "some evidence of right median nerve latency" suggesting mild right carpal tunnel syndrome. He also reviewed the MRI and opined that Claimant had "some central disk bulging at C5-6," small focal herniation at C6-7 and early discogenic changes or disc disease at the C5-6 and C6-7 levels. (EX-14, p. 9). Dr. Wilson opined Claimant had a small herniation at the L5-S1 level, mild carpal tunnel syndrome to the right wrist and right C6 radiculopathy. He recommended neck stretching exercises and prescribed anti-inflammatory drugs and extra strength Tylenol. (EX-10, p. 33; EX-14, pp. 10-11, 52-57; CX-2, pp. 10-11, 52-57).

On March 23, 2000, Claimant returned to Dr. Wilson's office for complaints of pain, numbness and tingling in his right arm. He described the pain as "sharp and constant." (EX-14, p. 58; CX-2, p. 58). Dr. Wilson opined Claimant has C6 radiculopathy which was not improving and recommended Claimant be examined by a neurosurgeon or an orthopaedic surgeon who specializes in the neck and back. (EX-14, pp. 12, 17; CX-2, pp. 12, 17). Dr. Wilson noted his office called Carrier to explain that Claimant "was encouraged to be as active as he could be at home and to return to the company at light duty." (EX-10, p. 34; EX-14, pp. 11-12). Dr. Wilson restricted Claimant from lifting anything over 10 to 15 pounds over his head with his right arm because of the safety concerns related to the numbness and tingling in his hand. (EX-14, pp. 14-15; CX-2, pp. 14-15).

Dr. Wilson explained he diagnosed a C6 radiculopathy because Claimant had reported having numbness and tingling in his right middle finger, index finger and thumb which is exactly the part

of the hand affected by the nerve root at the C6 level. (EX-14, pp. 15-16, 29; CX-2, pp. 15-16, 29). Moreover, he noted the paracentral herniation at C6-7 was an indication of C6 radiculopathy based on his clinical findings. (EX-14, pp. 70-75). He observed that MRIs are not a perfect test and do not always corroborate other clinical findings. For a radiculopathy to exist, there has to be stenosis, impingement or inflammation. (EX-14, p. 70; CX-2, p. 70). However, he noted an MRI from January 26, 2000 revealed Claimant had a small focal herniation at the C6-7 level, which indicates there is an impingement of Claimant's spinal cord or nerves even though the radiologist did not use the term "impingement." (EX-14, pp. 71, 75; CX-2, pp. 71, 75). He opined that a radiologist's report should be considered with the clinical examination in reaching diagnostic opinions. (EX-14, p. 76). There was enough suspicion in Claimant's presentation and MRI to warrant a neurosurgeon's assessment. (EX-14, p. 78). Dr. Wilson summarized his opinion regarding the etiology of Claimant's condition as a "cervical strain as a result of lifting railroad ties, that had resulted in either a small paracentral herniation or some combination of herniation and inflammation in the cervical spine, that localized to the right C-6 nerve root." (EX-14, pp. 80-81; CX-2, pp. 80-81). He further opined that "something pressing (or irritating) on the C6 nerve root" is causing Claimant's pain and symptoms. (EX-14, pp. 81-82).

Dr. Wilson explained he diagnosed a mild carpal tunnel syndrome in Claimant's right hand based on a diminished grip strength test which was consistent with a problem in the median nerve. (EX-14, pp. 30-31; CX-2, pp. 30-31). Dr. Wilson testified individuals can develop carpal tunnel syndrome when their work compels them to perform repetitive motions with their hands or fingers, which includes gripping with their fingers. (EX-14, p. 33; CX-2, p. 33). He opined Claimant's mild carpal tunnel syndrome is probably related to his C6 radiculopathy because of the low severity of his symptoms. (EX-14, p. 35; CX-2, p. 35).

Dr. Wilson opined Claimant's discogenic disease at the C6-7 level is "very likely" due to the acute injury on December 28, 1999 overlaid on the process of aging. (EX-14, p. 46; CX-2, p. 46).

After having a description of Claimant's activities in the videotape surveillance narrated to him by Claimant's Counsel without objection from Employer/Carrier's Counsel, Dr. Wilson

testified his opinion of Claimant's condition would remain unchanged. He stated the "tapes are irrelevant." (EX-14, p. 13; CX-2, p. 13). He concluded "there's no way of assessing pain on any of those videotapes. There's no way of assessing what his activity . . . level is. I mean, he was . . . put in a catch-22 situation by being told that he could go back to work with as much activity as he could tolerate and being told by work that he couldn't come back unless he was fully released. And I told him that I felt like he was probably going to need some kind of a weight restriction for lifting with his right arm but that otherwise, you know, it was one of those things, that there was a chance that the radiculopathy could resolve without surgery but that I felt like in light of the fact that it was not improving, he probably deserved to be worked up by a neurosurgeon since I don't do neck surgery." (EX-14, p. 14; CX-2, p. 14).

Dr. Wilson testified if Claimant's condition remains the same today as it was on March 23, 2000, then he would continue to recommend that Claimant be examined by a neurosurgeon. (EX-14, p. 17; CX-2, p. 17).

Dr. Wilson stated he considers Claimant's case a travesty of what the workers' compensation system is about. (CX-2, p. 64). He believed Claimant was caught in a Catch-22, being told he could do light-duty work, but being refused such work by Employer. (CX-2, pp. 65, 69). Dr. Wilson stated that "I don't think anybody has asserted that [Claimant] was completely incapacitated by his injury." Claimant expressed a willingness to go back to work with restrictions and was told he could not without a full release. He further opined, without reviewing the video, that the tape does not invalidate Claimant's complaints, physical findings or pain. (EX-14, p. 62). He considered Claimant's complaints of pain legitimate with a "wealth of clinical findings" to corroborate his complaints and believed Carrier was being unreasonable in its handling of Claimant's claim. (CX-2, pp. 68-69). He did not believe that Claimant was "trying to get over or trying to put one over on the system." The sham, if any existed, "was created by the patient's company and his workers' compensation carrier" according to Dr. Wilson. (EX-14, pp. 69, 85-86). Dr. Wilson acknowledged that he is a defense-oriented physician by reputation and has a very low tolerance for people who do not work, especially people who use back pain as a reason for never working again. (CX-2, p. 86).

Martin R. Haig, M.D.

Dr. Martin Haig, a board-certified orthopaedic surgeon (CX-5), examined Claimant on March 30, 2000, for complaints of neck and low back pain associated with a work injury on December 28, 1999. He noted that Claimant had been examined by Dr. Esses and Wilson who rendered diagnoses but no treatment. (EX-10, p. 36; CX-4, p. 1).[4] Upon "very careful" physical examination, including a straight leg test, Dr. Haig reported Claimant "complained bitterly of right low back pain over L5, S1" when standing but otherwise noted no abnormalities. Range of motion of the shoulder appeared to be normal with limited extension of the neck and rotation of the chin. Dr. Haig reviewed the January 26, 2000 MRI which he interpreted as showing a bulging disc at the C6-7 level, of a moderate degree, which was pressing on the spinal canal. The MRI also showed a definite bulging disc at the L5-S1 level without herniation.

Dr. Haig opined "it is somewhat puzzling that this man has had serious symptoms, and yet no one has treated him now six months post-injury. I don't think he is a surgical candidate, but he certainly deserves a trial of physical therapy closely supervised so that it does not last indefinitely. Also, epidural nerve blocks would help him. If that does not succeed then we can re-assess the program later." (EX-10, p. 37; CX-4, p. 2). Dr. Haig did not opined whether Claimant could return to work and did not state an opinion as to what type of work he could perform. (CX-4, p. 3).

The Contentions of the Parties

Claimant contends that he was temporarily and partially disabled from December 29, 1999 through January 20, 2000 based upon the difference of Claimant's average weekly wage of $682.68 and his actual earnings from Employer. Claimant further contends he was temporarily and totally disabled from January 21, 2000 to July 24, 2000, based upon an average weekly wage of $682.68. Claimant contends he is entitled to all reasonable and

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[4] Claimant testified at trial that he was referred to Dr. Haig by the U.S. Department of Labor. Dr. Haig's medical report is addressed to Carrier, but is also copied to Claimant's Counsel. In post-hearing briefs, both parties acknowledge that Dr. Haig conducted an independent medical examination by the U.S. Department of Labor.

necessary medical treatment, and past due medical bills, arising out of the December 28, 1999 work accident, including a referral to Dr. Foster, a neurosurgeon, and is temporarily and partially disabled from July 25, 2000, and continuing, based upon an average weekly wage of $682.68 and a weekly wage-earning capacity of $397.85.

Employer/Carrier, on the other hand, contend that Claimant lacks credibility and Dr. Wilson's lack of qualifications and his reliance on Claimant's impaired truthfulness is similarly unreliable. Therefore, Employer/Carrier assert Claimant reached MMI on February 25, 2000 and could return to full-duty as of that date.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Claimant's Disability

The parties stipulated, the record establishes and I find that Claimant suffered an injury on December 28, 1999, within the course and scope of his employment with Employer. Therefore, I find and conclude that Claimant has sustained a

disabling injury under the Act. However, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching MMI is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance

Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once the claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of MMI. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

Initially, Employer/Carrier argue that Claimant is incredulous as he was shown at the hearing in this matter to have lied on his job application to Gulf South Systems. Employer/Carrier contend Claimant lied about the detail with which Dr. Esses conducted his physical examinations of Claimant. Thus, Employer/Carrier assert, Claimant's statements at the hearing and to his physicians are unreliable and he should expect no recovery under the Act. See Bolden v. G.A.T.X. Terminals Corp., 30 BRBS 71 (1996).

During the formal hearing in this matter, Claimant acknowledged he lied on his application with Gulf South Systems about his prior injuries and physical condition so that he could find a job and support his family. His truthful job applications with Staffing Specialties Services yielded no employment. He further provided uncontroverted testimony that he informed his supervisor at Gulf South Systems about his prior physical complaints and condition. The Board has held that an

administrative law judge may credit the testimony of a claimant who adequately explains a misrepresentation of his prior physical condition on a job application in order to obtain work. See Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995). In the instant case, I find Claimant has credibly and adequately explained the reasons why he misrepresented his prior physical condition on his job application with Gulf South Systems.

Claimant and his spouse, who is a former employee of a cardiologist, assert Dr. Esses did not perform a physical examination of Claimant despite Dr. Esses' testimony to the contrary. I note Dr. Esses did conduct a deep tendon reflex examination on Claimant and straight leg raising tests. He apparently did not conduct pinwheel testing or grip strength testing as these tests are not delineated in his submitted medical reports. Notwithstanding the foregoing, I find Dr. Esses performed a physical examination of Claimant that may not have included testing as thorough as Drs. Wilson and Haig, which arguably led to the discrepancy in testimony regarding Dr. Esses's physical examination of Claimant. However, I find no party has proffered incredulous testimony with regard to the physical examination conducted by Dr. Esses in this matter. Accordingly, I find and conclude Claimant's testimony in this matter is credible and any alleged inconsistencies have been adequately explained.

The medical reports of two emergency departments and three orthopaedic surgeons have been submitted in this matter. Employer/Carrier argue any reliance on Dr. Wilson is suspect due to his lack of qualifications and as he only examined Claimant on two occasions. I note Dr. Wilson is a board-eligible orthopaedic surgeon chosen by Claimant. I further note he examined Claimant only two times whereas Dr. Esses, Employer/Carrier's physician, examined Claimant on four occasions. Even though Dr. Wilson expressed extreme displeasure during cross-examination of his deposition testimony regarding the handling of Claimant's claim by Employer/Carrier, he provided otherwise cogent, well-reasoned medical opinions during the deposition. Therefore, I find Dr. Wilson was a credible witness qualified to render medical opinions in this matter and I assign significant weight to this treating physician's opinions. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000); Downs v. Director, OWCP, 152 F.3d 924 (9th Cir. July 10, 1998) (unpublished).

Employer/Carrier argue that Dr. Esses has determined Claimant is fit to return to work. Even though Dr. Esses is a well-qualified, board-certified orthopaedic surgeon, he based his opinion that Claimant had reached MMI, and was thus able to return to his former job, on the February 25, 2000 videotape surveillance of Claimant in which Claimant has acknowledged he spent five to ten minutes working on his pick-up truck with his father. I note there is no inconsistent evidence in the surveillance video regarding Claimant's complaints of pain and symptomotology. Having reviewed the video, I question Dr. Esses's powers of observation since he apparently relies exclusively on the subject video to conclude Claimant can return to his usual employment. I find Dr. Wilson's opinion regarding the video surveillance persuasive as the video cannot gauge Claimant's actual pain. Furthermore, Claimant had visited the emergency room the day before this video surveillance and received injections of narcotic analgesia and had received a prescription of Vicodin. Claimant points out he had received a good night's rest and temporarily felt better after having received these medications.

Moreover, I note Dr. Esses issued a return to work slip on January 27, 2000, stating Claimant could return to work at his own discretion and could determine his restrictions accordingly. However, Dr. Esses was inconsistent in his opinions and treatment of Claimant which detracts from the probative value to be assigned thereto. On January 24, 2000, although detecting no signs of radicular pain in Claimant's neck or low back or nerve root impingement of the cervical or lumbar spine, and based on Claimant's complaints, Dr. Esses ordered an MRI. On February 21, 2000, he ordered an EMG and referred Claimant to a hand specialist. Moreover, the weight of the credible testimony indicates he ordered a muscle stimulator for Claimant's back sometime in March 2000. On March 27, 2000, after having treated Claimant for two months, Dr. Esses viewed the February 25, 2000 surveillance videotape and, notwithstanding his prior treatment recommendations, opined Claimant could return to gainful employment and had reached MMI as of February 25, 2000. Therefore, I find Dr. Esses's opinion that Claimant was fit to return to his former employment is not reasoned as it was based on the February 25, 2000 video surveillance and was contrary to the treatment plan he had prescribed for Claimant.

Claimant argues he has been temporarily disabled since the December 28, 1999 work accident since the January 26, 2000 MRI shows he had a central bulging disc at the C5-6 and C6-7 levels,

a herniation at the C6-7 levels and focal herniation present at the L5-S1 level. Claimant further argues that Dr. Wilson opined he suffered from C6 nerve root impingement in his neck and mild carpal tunnel syndrome in his right wrist. Employer/Carrier assert that Dr. Wilson's opinions should be discounted since he did not consider himself qualified to make a diagnosis of the cervical spine. I note that although Dr. Wilson recommended Claimant be examined by a neurosurgeon, he based his C6 radiculopathy diagnosis on Claimant's subjective complaints, his clinical examination and the January 26, 2000 MRI. He based his diagnosis of mild carpal tunnel syndrome on the February 15, 2000 EMG. Dr. Esses concurred with the conclusions reached in the EMG, but reported the carpal tunnel syndrome was not work-related. Dr. Haig, in agreement with Dr. Wilson, concluded that the bulging disc at C6-7 was pressing on the spinal canal. Accordingly, I find no basis to discount the opinions of Dr. Wilson.

Claimant also avers that the independent medical examiner, Dr. Haig, concluded Claimant should have further medical treatment. Dr. Haig reported Claimant had bulging discs at the C6-7 levels, which were pressing on the spinal canal, as well as at the L5-S1 levels. I note Dr. Haig did not release Claimant to return to work, nor did he opine what type of work Claimant could perform.

Therefore, for the foregoing reasons, I find Drs. Wilson and Haig's opinions that Claimant suffered from C6 radiculopathy and disc herniations to be more reasoned than Dr. Esses's opinion.

Claimant further notes that Dr. Esses released Claimant for his regular work but at Claimant's discretion to determine his restrictions. Moreover, Claimant alleges in March 2000 Dr. Esses prescribed a muscle stimulator for Claimant's back yet he stated on March 27, 2000 that Claimant had reached MMI as of February 25, 2000. Dr. Esses testified he never prescribed a muscle stimulator for Claimant. However, Claimant presented uncontroverted evidence that the stimulator supply company informed him that Dr. Esses's office had ordered the stimulator for him and talked to "Anita" in Dr. Esses's office about the muscle stimulator, but was unable to secure the stimulator because Carrier had taken away his medical benefits. Dr. Esses confirmed he employs an Anita in his office. Therefore, in the absence of contrary evidence, I find the weight of the credible evidence indicates Dr. Esses prescribed a muscle stimulator for Claimant.

In light of the testimonial and medical evidence of record, I find Claimant is temporarily disabled from the date of injury, December 28, 1999, and continuing based on his cervical and lumbar symptoms. Employer/Carrier argue Claimant reached MMI on February 25, 2000. However, both Drs. Wilson and Haig have determined that Claimant is in need of further medical treatment. In the U.S. Fifth Circuit Court of Appeals, under whose jurisdiction this matter arises, a claimant has not reached MMI when a physician determines that further medical treatment should be undertaken. Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 126, 29 BRBS 22, 25 (CRT) (5th Cir. 1994). Moreover, Dr. Wilson has stated Claimant cannot return to his former work with Employer. Dr. Haig did not opine whether Claimant could return to his former work with Employer or any other work. Although, Dr. Esses stated Claimant could return to his former work, there is no correlation between Claimant's video activities and the heavy labor demands of his usual occupation. I find Dr. Esses's opinion regarding Claimant's ability to return to work to be unreasoned as discussed above. Accordingly, I find Claimant has not reached maximum medical improvement in view of recommended medical treatment regimes and is temporarily disabled from December 28, 1999 and continuing.

Although Claimant has not reached MMI, he has clearly exhibited an ability to perform work. Based on the record as a whole, I find Claimant was medically able to seek work and in fact secured work. See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992). Employer/Carrier have not presented any evidence of the existence of any suitable alternative employment although they argue Claimant has reached MMI. However, the record indicates Claimant worked for Employer until January 20, 2000.[5] Claimant next worked for Gulf South Systems and Oil Tools, Inc. from July 25, 2000 through December 2, 2000. Claimant has continued to work for Shamrock Equipment Rental Company since January 4, 2001. Therefore, I find Claimant was temporarily and totally disabled from January 21, 2000 to July 24, 2000 and again from December 3, 2000 to January 3, 2001. I further find Claimant was temporarily and partially disabled from July 25, 2000 to December 3, 2000 with a post-

[5] The parties stipulated that Claimant was paid compensation benefits from January 21, 2000 to March 16, 2000. See JX-1.

injury weekly wage-earning capacity of $386.93[6], and continues to be temporarily and partially disabled from January 4, 2001 and continuing, with a post-injury weekly wage-earning capacity of $280.00.[7]

B. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910(a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed toward establishing a claimant's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992). Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

The Act sets a high threshold and requires the application of Section 10(a) or 10(b) except in unusual circumstances. Section 10(a) is the presumptively proper method for calculating average weekly wage and must be employed unless it would be unfair or unreasonable to do so. Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked

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[6] Employer/Carrier did not proffer any arguments in their post-hearing brief with regard to the amount of Claimant's post-injury wage-earning capacity. Therefore, I find the uncontroverted record indicates Claimant earned a total of $8,512.50 during the 22 weeks he worked for Gulf South Systems and Oil Tools, Inc. ($6,937.50 + $1,575.00 = $8,512.50). Therefore, Claimant had a wage-earning capacity of $386.93 ($8,512.50 ÷ 22 weeks = $386.93 per week). (EX-16, pp. 4-6).

[7] The record indicates Claimant earns $7.00 per hour with Shamrock Equipment Rental Company thus rendering a weekly wage of $280.00 ($7.00 per hour x 40 hours per week = $280.00 per week). (Tr. 78, 97).

substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The administrative law judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P&M Crane Co., 23 BRBS 389, 393 (1990); Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity **at the time of injury**. Hall v. Consolidated Employment Services, Inc., 139 F.3d 1025, 1031 (5th Cir. 1998); Gatlin, supra at 823. The Fifth Circuit further observed that "typically, a claimant's wages at the time of injury will best reflect the claimant's earning capacity at that time. It will be an exceedingly rare case where the claimant's earnings at the time of injury are wholly disregarded as irrelevant, unhelpful or unreliable." Id.

In post-hearing briefs, the parties argue that Section 10(c) of the Act should be utilized to determine Claimant's average weekly wage. However, the parties arrive at different figures for the Section 10(c) average weekly wage calculation. As the record indicates Claimant worked fourteen days on, fourteen days off and is devoid of any evidence that he worked 5 or 6 days per week, Sections 10(a) and 10(b) of the Act cannot reasonably be

applied. An average daily wage cannot be computed as the number of days Claimant worked is not discernible from the submitted wage records. Accordingly, Section 10(c) will be applied to determine Claimant's average weekly wage.

The primary concern when applying Section 10(c) is to determine a sum which reasonably represents the earning capacity of the injured employee. Miranda v. Excavation Construction, Inc., 13 BRBS 882 (1981).

In the instant case, Claimant proffers two methods for calculating his average weekly wage. Initially, he argues that he earned $11,833.10 during the four-month time period he worked for Employer. Claimant asserts this figure can be annualized to $35,499.30 ($11,833.10 x 3 = $35,499.30), to render an average weekly wage of $682.68 ($35,499.30 ÷ 52 weeks = $682.68 per week). He notes this calculation gives due regard to the earnings of Claimant at the time of his injury and earnings of other employees in similar work classifications. Claimant contends it is not appropriate to use his actual wages from the 52 weeks preceding December 28, 1999 as Claimant left other employment for a better job with Employer and combining those wages would unfairly reduce his average weekly wage. Alternatively, Claimant argues that utilizing the actual wages earned by Claimant's co-workers with Employer in the year preceding December 28, 1999, renders an average weekly wage of $668.74. (See CX-10, p. 3). Claimant argues this figure complies with Section 10(b) of the Act and reasonably represents Claimant's annual earning capacity.

Employer/Carrier contend Claimant's total earnings for the 52-week period before December 28, 1999 divided by 52 weeks renders an average weekly wage of $558.28 ($29,030.40 ÷ 52 weeks = $558.28 per week). Employer/Carrier note this formula had been agreed upon by the parties and that it reasonably represents the average annual earning capacity of Claimant. Furthermore, Employer/Carrier argue, this figure was used to pay compensation benefits to Claimant from January 21, 2000 to March 16, 2000, and it comports with the reality of Claimant's position with Employer. Finally, Employer/Carrier contend the wages of Claimant's co-workers should not be used as only two of Claimant's four co-workers worked all of 1999.

The Board has held that a worker's average weekly wage should be based on his earnings for the seven or eight weeks during which he worked for the employer rather than on the

entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury. See Miranda, supra at 886.

Claimant's wage records indicate he worked 17 weeks for Employer from August 31, 1999 to December 28, 1999, and earned $11,833.10. (See EX-11). He thus averaged $696.06 per week ($11,833.10 ÷ 17 weeks = $696.06 per week). Like Miranda, Claimant was earning more money weekly for the 17 weeks of employment with Employer when he was injured than he earned weekly in his previous six years of work with the Louisiana State government. Thus, I find as the Board did in Miranda, that a calculation based on his increased wages at the employment where he was injured "would best adequately reflect Claimant's earning potential at the time of his injury." Accordingly, I find Claimant's average weekly wage at the time of his injury was $696.06.

C. Medical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer/Carrier to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See

Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

In the present matter, Employer has been found liable for Claimant's December 28, 1999 work injury. Accordingly, Employer is responsible for all reasonable and necessary medical expenses related to Claimant's cervical and lumbar conditions. Both Drs. Wilson and Haig have reported that Claimant is in need of further medical treatment. Dr. Wilson has recommended that Claimant be referred to a neurosurgeon for his cervical and lumbar complaints, which I find to be reasonable and necessary. Dr. Haig has recommended physical therapy and epidural nerve blocks. Therefore, I find Employer/Carrier are responsible for Claimant's further reasonable and necessary medical treatment which includes Claimant's referral to a neurosurgeon.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the

Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[8] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for **temporary total disability** from **January 21, 2000** to **July 24, 2000**, and from **December 3, 2000** to **January 3, 2001**, based on Claimant's average weekly wage of $696.06, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for **temporary partial disability** from **July 25, 2000** to **December 3, 2000**, based on two-thirds of the difference between Claimant's average weekly wage of $696.06 and his $386.93 loss of wage-earning capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay Claimant compensation for

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[8] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **July 26, 2000**, the date the matter was referred from the District Director.

temporary partial disability from **January 4, 2001**, and continuing, based on two-thirds of the difference between Claimant's average weekly wage of $696.06 and his $280.00 loss of wage-earning capacity, in accordance with the provisions of Section 8(e) of the Act. 33 U.S.C. § 908(e).

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 28, 1999 work injury, including his referral to a neurosurgeon and physical therapy, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

6. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 3d day of October 2001, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge